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OF
PUBLIC COMPANIES

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BY

NEWMAN WATTS,

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PREFACE.

COMPANY LAW has attained to great importance at the present day, but whilst the subject, generally, has been treated of ably and adequately, the Author is not aware that the subject of this little work has hitherto been exalted to the dignity of separate treatment. The Author, therefore, ventures to think that the importance which this branch of Company Law has acquired, in view of certain recent cases, is a sufficient excuse for the appearance of this book.

NEWMAN WATTS.

ROLLS CHAMBERS, 89, CHANCERY LANE,
January, 1880.

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THE LAW OF PROMOTERS.

CHAPTER I.

STATUS OF PROMOTERS.

It will be useful at the outset to define accurately the term "Promoters." It is a word used to denote a number of persons who project and endeavour to float a public company. It follows from the foregoing definition that their acts must be preliminary in their character, and to a very large extent gratuitous, until that takes place to which their services tend, viz., the actual incorporation of the intended company. It was once thought (and actually held) that contracts entered into by promoters are, or may be, binding on a company when formed. This doctrine cannot now be considered to be law at the present day. The law now is that promoters who choose to make contracts "on behalf of" a non-existent company do so at their own risk, and are exclusively liable thereon. It is a presumption at law that when an agent contracts, he does so on behalf of an existent principal; but in the case of promoters, the principal is not in existence, and

an attempted ratification by the company on its coming into existence is of no avail, as "there is no case in which a person can by a subsequent ratification make himself liable as principal, so as to discharge the agent where the principal was not in existence at the time of the original contract." *

Thus, as we have seen, the promoters will be personally liable on their contracts unless the company, by a new agreement, with the assent of the parties dealing with the promoters to the substitution of liability, adopt such contract, and this it is perfectly competent for the company to do, subject only to this condition, that such adoption does not offend against the doctrine of Ultra Vires, controlling the company when incorporated. This doctrine and its bearing upon the validity or invalidity of the contracts of promoters will be found discussed in the next chapter. Engagements entered into by or with promoters, not expressly embodied in, or provided for, either in the Act of Parliament or in the Articles of Association, as the case may be, cannot, even though within the powers and scope of the company when incorporated, be enforced by or against it, unless in some manner adopted by it.†

"It is inconsistent with the policy of such Acts (railway and other) to hold that there can be any other terms binding on those who subscribe their money, beyond

* *Per* Willes, J., in *Scott* v. *Lord Ebury*, L. R. 2 C. P. 255.

† *Caledonian, &c., Railway Company* v. *Helensburg*, 2 Jur. N. S. 695; 2 Macq. 391.

what appear on the face of the Act itself. . . . The statutory powers are given on the faith of the terms apparent on the Act itself. . . . In holding that the company is a body different from its promoters, in substance as well as in form, I am acting on what is the mere truth, and no injustice can arise to those who have dealt with the projectors, for against them, and all under whose authority they acted, there will be a clear right of action if the company does not fulfil the engagements which they contracted it shall perform, and that is surely all which those who have dealt with the projectors can claim as their right." *

Although a company, non-existent at the time of an agreement made on its behalf, cannot at law ratify such agreement,† yet in equity, in a case where the company had adopted an agreement to pay £2000 to the plaintiffs through one of their promoters, it was held that the performance of the agreement was not contingent on the actual commencement of business by the company, and that the plaintiff could maintain a suit, as *cestuis que trustent*, against the company and the directors, amongst whom was the promoter, to whom the sum of £2000 was to be paid, and were not obliged to sue in the name of the promoter.‡

* *Per* Lord Cranworth, in *Caledonian, &c., Railway Company* v. *Helensburgh*, 2 Jur. N. S. 695 ; 2 Macq. 391.

† *Kelner* v. *Baxter*, L. R. 2 C. P. 174 ; *Scott* v. *Lord Ebury*, *ibid.*, 255.

‡ *Touche* v. *Metropolitan Railway Warehousing Company*, L. R. 6 Ch. 671.

A Court of Equity will restrain a company from reaping the benefit of a contract made by its promoters without performing the stipulation agreed to by them. This proposition is well illustrated by the leading case of *Edwards* v. *Grand Junction Railway Company*,* the facts of which were as follows :—

The promoters of the company having designed the railway to cross a certain turnpike-road, the trustees of the road took steps to oppose the bill in Parliament. Eventually the promoters agreed with the trustees that the turnpike-road should be carried over the railway by a road identical in width with the existing road, with suitable approaches, &c., and thereupon the trustees withdrew their opposition; but on account of the expense, clauses confirmatory of this arrangement were not inserted in the bill. The bill having passed the company proceeded to construct the bridge, with a width of only 30 feet. It was held that the promoters were entitled to an injunction restraining the company from interfering with the road in any manner other than that agreed to by the promoters. In a recent case, decided since the passing of the Judicature Acts, it was held that a company can ratify, in equity, a contract which was made by its promoters when the company was not in existence.†

In the case just cited the plaintiff, who was a patentee of roller skates, entered into an agreement with a certain Baron de Baillot, the main provisions of which were that

* 1 My. & Cr. 650.

† *Spiller* v. *Paris Skating Rink Company*, 7 Ch. Div. 368.

the Baron should construct certain skating rinks; that the plaintiff granted to the Baron the exclusive right of using his patent skates at a certain price; that no other skates should be used in the said rinks; that the Baron should not have the right of assigning the contract, but might associate himself with other persons under any form for working out the contract. The defendant company were duly incorporated under the Acts of 1862 and 1867. The statement of claim alleged that the plaintiff, at the request of the Baron, consented to the transfer to the company of all the rights and obligations of the Baron under the said agreement, and that by virtue of certain arrangements, to which plaintiff was a party, the company soon after their incorporation acquired all the rights of the Baron, and became subject to all the obligations of the Baron as if the company were parties to the agreement; also that the company and their directors had, by their Memorandum and Articles of Association, power to enter into such contracts as the one in question. The statement of claim also alleged that the company had acted upon and derived profits under the agreement. The defendants having demurred, on the ground that the company had no power to ratify contracts made by its promoters, Malins, V.C., in overruling the demurrer, said, "It is argued that a contract entered into between certain individuals before a company is formed cannot be binding on the company when formed; but here the question is whether such a contract cannot be adopted by the company when formed." A distinction must be drawn be-

tween cases in which it is sought to shift the burden of promoters' contracts, on which such promoters are exclusively liable, over to the company, and where the company have ratified and acted upon such contracts.*

There are cases, too, where a contract though not in the first place binding upon a company, may be so adopted and ratified by them as to be held binding on them.†

* Compare the cases of *Kelner* v. *Baxter*, L. R. 2 C. P. 174, and *Spiller* v. *Paris Skating Rink Company*, 7 Ch. Div. 368-70.

† See *Touche* v. *Metropolitan Railway Warehousing Company*, L. R. 6 Ch. Ap. 671.

CHAPTER II.

VALIDITY OR INVALIDITY OF PROMOTERS' ENGAGEMENTS TESTED BY REFERENCE TO THE DOCTRINE OF ULTRA VIRES.

MENTION has been made, in a previous part of this work,* of the doctrine of Ultra Vires as affecting the validity of promoters' engagements; or, to state it more correctly, the capacity of companies to ratify or adopt the acts of their promoters which are within the scope of their own constitution.

The doctrine in question may be shortly explained thus:—A doctrine of comparatively recent origin, its tendency is to considerably curtail the powers and obligations of companies. The principle of the doctrine is, that Companies exist for the attainment of certain objects specified in the instruments constituting them, or necessarily or impliedly falling within the scope of the same; consequently they can enter into no transactions and incur no liability but such as arise out of, or is incidental to, the purposes for which they were created. In a word, they are bound by their empowering instruments, whether special Act or under the Companies Acts, 1862 and 1867.

* Chap. I., *ante*, p. 2.

With respect to all agreements entered into by or with promoters, it may be said at once that, unless they are embodied in the Act of Parliament or in the Articles of Association of a company registered under the above-named Acts, as the case may be, they are absolutely void unless they are in some way acted on or expressly or impliedly adopted by the company as hereinbefore stated.

But in order to assure the validity of their acts or agreements, promoters must take care that this further condition is observed, viz., that such acts or agreements are Intra Vires of the company as constituted. Unless this condition is satisfied, the company cannot make themselves liable for the acts of their promoters, though willing to do so, nor can they, on the other hand, take advantage of the same. All agreements by promoters, in the nature of *bribes*, to buy off opposition to a bill, are not only Ultra Vires but illegal, and consequently the promoters would be held exclusively liable upon agreements of this character.

Whilst agreements to buy off personal INFLUENCE are Ultra Vires of the future company, those seeking to buy off the opposition of persons having a legal right to oppose will be held good, there being, in this latter case, consideration which the company may, as has been previously shown, adopt. As to compensation agreements, whether for actual damage to property and rights of proprietors, or, for interference with private enjoyment, and agreements to take lands, these are perfectly good, but will be binding only when made conditional upon the passing of

the Act of Parliament. And in order that agreements by promoters, to pay sums by way of personal compensation may be good, *actual* damage must be done.

In the case of *Colman* v. *Eastern Counties Railway Co.*, it was held that it was Ultra Vires of the defendant company to guarantee profits and secure the capital of an intended steamboat company, who were to run steamboats from Harwich in connection with the railway of the defendant company in order to increase their own traffic.* Moreover, the acquiescence of shareholders in transactions beyond the scope of the company will not have the effect of rendering such transactions legal.†

The latest tendency of the decisions, in applying the doctrine under consideration, is to hold that, companies may, in furtherance of the objects for which they were incorporated, enter into contracts *not forbidden* by their constituting instruments, and not merely those specially authorised therein.‡

* 10 Beavan, 1.

† *Per* Lord Langdale in *Colman* v. *Eastern Counties Railway Company*, 10 Beav. 1.

‡ See *Taylor* v. *Chichester and Midhurst Railway Company*, L. R. 2 Exch. 384.

CHAPTER III.

CONTRIBUTION BETWEEN, AND RIGHTS OF PROMOTERS INTER SE.

THE House of Lords decided, in the leading case of *Bright* v. *Hutton*,* that no partnership exists between persons associated together in an unsuccessful attempt to form a company. "In the case of provisional committees, or the projectors of a company, it is now perfectly well settled law and acted upon in every Court of law in Westminster Hall, that there is no partnership between them; no common power of binding each other merely by such a relation; each binds himself by his own acts only. There are, therefore, very few creditors of such a body collectively, though many of one, two, three, or more acting individuals, who compose the committee or are projectors; and so there may be a series of contracts, to which there are different contributories, according as they have been authorised by different persons, very few binding all, and those only upon the rare accident of each individual authorising that particular contract. . . . . No person can have a judgment or decree against the whole body, except in the rare case that all the projectors have

* 3 H. L. Cases, p. 341.

jointly contracted; nor are there any contributories of the entire company, except in the extraordinary case of all having contracted." *

And where promoters of an abortive company bought property for the purposes of the company, they were held, nevertheless, not to be partners.†

One of the promoters of a company cannot maintain a suit against his fellow promoters for contribution towards expenses incurred by him in promoting the company, unless he is willing that an account should be taken of the expenses incurred by all the promoters.‡ "The only other ground on which, in my opinion, it would have been possible for the plaintiff to maintain his suit is this—he might say, I was one of several persons who endeavoured to form a company, and for that purpose we paid a great deal of money; it was a joint concern . . . . and I have paid more than my share; you are therefore bound to repay me what I have overpaid for the purpose; that is to say, we endeavoured to produce a certain work,—we were, so to speak, tenants in common or jointly interested in the affair, and we ought to bear the liabilities between us. But I find no case made of that description." §

In an action by a promoter claiming contribution from his co-promoters, it is not sufficient that he should rest his claim in that behalf merely upon the particular trans-

* *Per* Parke, B., in *Bright* v. *Hutton*, 3 H. L. C. at p. 368.
† *Hamilton* v. *Smith*, 5 Jur. N. S. 32.
‡ *Denton* v. *Macneil*, L. R. 2 Eq. 352.
§ *Ibid.*, *per* Lord Romilly, M.R., pp. 357-8.

action in which he was engaged, but should put it upon the ground that all the expenses of every sort and description of the undertaking be borne *pari passu* by everybody concerned.*

And where such a claim for contribution is made there must be the offer to pay what, if anything, may be found due from the plaintiff on taking the account, although, possibly, that account might turn out against him.†

A., B., and C., by an agreement in writing, hired premises of D. The premises so hired were intended to be, and were, used for the purposes of a joint-stock company, of which A., B., and C. were, at the time of the contract, promoters. Rent was for some time paid by the company, but ultimately became in arrear; whereupon D. (the landlord) sued A., B., and C. upon the agreement; B. and C. suffered judgment by default, and D. recovered the amount of rent and costs against A.:—Held, that A. was entitled to sue B. and C. for contribution, and that his remedy against B. was not affected by the circumstance of his having ceased to be a member of the committee of promoters before the accruing of the rent in respect of which the action was brought.‡

In the case last cited it was suggested on behalf of the defendants that there was a quasi-partnership between the plaintiff, Peplow, and Brooke and others, and that,

* See judgment of Lord Romilly in *Denton* v. *Macneil*, L. R. 2 Eq. pp. 357-8.

† *Ibid.*, p. 358.

‡ *Boulter* v. *Peplow*, 9 C. B. 493; *Boulter* v. *Brooke*, *ibid.*

consequently, though the plaintiff might be entitled to have an account taken in a Court of Equity, he was not entitled to contribution at law. Maule, J., in overruling the objection, said, "I think, supposing such partnership did exist, it by no means follows that the plaintiff would not be entitled to recover in this action. The three entered into a joint contract with White and Gillett (the landlords), who probably would not have dealt with a larger number. These three, therefore, alone incurred a joint liability to pay the rent, and they would be subject to contribution amongst themselves. Although it may be that, when each of the three has paid his share of the rent in respect of that joint liability, each may be entitled to charge such share in that partnership account, it by no means follows that the right of contribution *inter se* does not likewise exist. Each was liable *in solido* to the original demand; and from that arises an implied contract, that the one who pays the whole shall be reimbursed, in their respective proportions, by the other two." The inference that promoters, who enter into a joint contract, intend to incur the incidental liability to contribution, is not rebutted by the circumstance that the money they are called upon to pay under such contract may be chargeable by them against the company for whose benefit they assumed the liability.*

Whatever remedy promoters may have as against the other members of an inchoate company, those of the

* See judgment of Maule, J., in *Boulter* v. *Peplow*, 9 C. B., at pp. 506-7.

promoters who incur direct joint liability come under an implied liability *inter se.**

It would seem that promoters are liable to contribution irrespectively of the state of accounts amongst the quasi partners.†

A plaintiff, who was a member of a committee of promoters, became with eleven others, including the defendant, liable for a debt contracted in respect of the scheme. The creditor sued plaintiff, who ultimately paid the whole debt. Two of the original co-contractors died before the payment. Plaintiff now sued defendant for contribution. Held, firstly, that though there might be many cross liabilities amongst the provisional committee-men in respect of the scheme, an action lay, *at law,* for contribution against such of them as were liable to pay the debt, provisional committee-men (*i.e.*, promoters) not being partners. Secondly, that the plaintiff was entitled to recover only one-twelfth of the debt; the liability of a co-contractor to one who has paid the entire debt being, at law, to contribute an aliquot part according to the number of persons originally liable, without reference to the number liable at law at the time of payment.‡

Semble, that an action would have lain at law for

* *Per* Williams, J., in *Boulter* v. *Peplow,* 9 C. B., at pp. 506-7.

† See judgment of Talfourd, J., in *Boulter* v. *Peplow,* 9 C. B. p. 507.

‡ *Batard* v. *Hawes,* 2 Ellis & Blackburn, 287; *Batard* v. *Douglas, ibid.*

contribution against the representatives of the deceased co-contractors.*

The mere fact of a person agreeing to become a member of the provisional committee of an intended company, amounts to no more than a promise that he will act with other persons appointed, or to be appointed, for the purpose of carrying the scheme into effect. Therefore, in an action against a provisional committee-man for goods supplied on the order of the solicitor of the company, it was held that the law would not imply, from the mere fact of his agreeing to be a member of such committee, an authority from him to the other members of it to make contracts by himself or by the solicitor, nor an authority to the solicitor to make them on behalf of the committee. If the party not only consents to be a provisional committee-man, but authorises his name to be inserted and published in a prospectus, which merely states the names of the members of the provisional committee, and nothing more, that fact does not alter the liability. Even if such prospectus states the names of an acting or managing committee also, it is a question for a jury to say whether it means that the latter are to take upon themselves the whole management of the concern, or that the former have constituted the latter their agents to manage it on their behalf, in which case the former would be liable for the contracts of the latter. Where there is also evidence that the defendant has ACTED with relation to the proposed

* Dictum of Lord Campbell in *Batard* v. *Hawes*, 2 Ellis & Blackburn, pp. 297-8.

scheme, it is a question for the jury whether, by his consent and acts, he has authorised the solicitor, or secretary, or any member of the committee, to pledge his credit for the necessary and ordinary expenses to be incurred in forming the company; and if so, whether the work was done, and the credit given, on the faith of his being liable.*

In a case where A. and B. were the registered promoters of a company, a provisional committee being afterwards formed, and at a meeting of which A. was appointed secretary, and B. solicitor to the company, and other persons a managing committee, it was held that A. could not, merely upon these facts, recover against an acting member of the managing committee for services afterwards performed by him as secretary.† "When the fact appears that the plaintiff was a promoter of the company, the solicitor a promoter, and the defendant a chairman of a meeting of the promoters at which meeting the plaintiff is appointed secretary, it comes to this, that it is an appointment of the plaintiff by himself; and if he is to be paid at all, which I doubt, he must therefore pay himself." ‡

Under the jurisdiction to adjust the rights of contributories amongst themselves, given by the Companies Act, 1862, section 109, the Court will not, under the winding-up, enforce an alleged contract by the promoters

* *Reynell* v. *Lewis*, 15 M. & W., p. 517; *Wyld* v. *Hopkins*, *ibid.*

† *Wilson* v. *Viscount Curzon*, 15 M. & W. 532.

‡ *Per* Alderson, B., in *Wilson* v. *Viscount Curzon*, 15 M. & W., p. 536.

to indemnify persons signing the subscription contract against all liability in respect of shares, by directing a call payable primarily by the promoters only.*

* *In re Brampton and Longtown Railway Company, Addison's Case*, L. R. 20 Eq. 620.

CHAPTER IV.

PRELIMINARY EXPENSES.

In the event of the projected company failing to arrive at incorporation, the question arises by whom the necessary expenses incurred in promoting the company are to be borne. We have seen in a previous part of this work that members of inchoate companies are not partners. The House of Lords decided in *Hutton* v. *Thompson*,* that an original allottee of shares in an abandoned undertaking could not be made a contributory, and was not liable to any portion of the expenses of such undertaking. The House of Lords next decided that members of a provisional committee of promoters, likewise, were not liable to pay the preliminary expenses of an undertaking which had failed. There remained, therefore, only the *managing* committee to render liable, and these have been decided to be free from liability as a body, but that each member thereof is liable solely in respect of the particular engagements entered into by him.†

In the absence of a contract in that behalf entered into, between applicants for shares in a projected com

* 3 H. L. C. 161.

† *Bright* v. *Hutton*, 3 H. L. C. 341.

pany and the promoters thereof, the latter cannot expend any part of deposits received in liquidation of preliminary expenses, but must return the same without any deduction to the applicant for shares.*

In *Walstab* v. *Spottiswoode* the plaintiff applied to the promoters for seventy shares, and agreed to accept that number or any less number they might allot, to pay the required deposit per share thereupon and to sign the parliamentary contract and subscribers' agreement when required. Thirty shares were duly allotted to her and the plaintiff paid the deposit upon that number, and received the bankers' receipt for the same. She afterwards presented the receipt to the company, and made several fruitless applications for scrip, and at length was informed that the directors had come to the resolution not to issue any scrip, and that the greater part of the deposits had been expended, and the balance would be rateably divided. The plaintiff hereupon brought her action to recover back from a member of the managing committee the sum paid by her as deposits on the shares so allotted to her: Held first, that there was sufficient evidence of the final abandonment of the project. Secondly, that, on its abandonment under the circumstances before stated, the plaintiff was entitled to recover back, as money had and received to her use, the *whole* sum so paid by her.

It appears that registration and other fees of an official character will be allowed under a clause in the empowering

* *Walstab* v. *Spottiswoode*, 15 M. & W. 501 ; *Nockels* v. *Crosby*, 3 B. & Cr. 814.

instruments of a projected company which provides for the payment out of the funds of the company "of the expenses incidental to the formation of the company;" so also, the professional services of solicitors, parliamentary agents, surveyors, accountants, and valuers will be allowed under such a clause, but where the services of persons of special technical knowledge are employed their aid must be indispensable.*

Certain persons proposed to form a company. They employed A. as their solicitor; he was so named, on provisional registration, under the Joint Stock Companies Act. The directors were not to be personally liable to the officers of the company. The solicitor was continuously employed until after the company had been completely formed and registered, and until it was wound up. The 44th article of the Deed of Settlement declared that "a sufficient part of the funds of the company should upon complete registration be appropriated in payment of the expenses of and incident to the formation of the company, including those of or having reference to the preparation and execution of that deed." When the company was before the Master on the Winding-up Act, the solicitor presented a demand for services from the earliest period up to that date. The Master allowed the demand as a *claim* only and not as a *debt*, leaving the solicitor to proceed at law. Held, reversing the order of Kindersley, V.C., which had permitted the order of the Master to stand, that the Master ought to have allowed the demand

* See Brice on Ultra Vires, p. 670, second edition.

as a debt, but subject to proof that the items came under the description contained in the 44th article, and subject also to taxation.* The importance of the subjoined judgments in the case of *Terrell* v. *Hutton*, to the subject of this chapter, justify their being given at length, *per* the Lord Chancellor: "The House goes along with the respondent to this extent, that the company ought not to be bound by the items in detail which are included in the bill; but provided it is established that this bill was made up either of items in respect of business properly done by Mr. Terrell after the formation of the company, or of items properly coming within the description of 'expenses of and incidental to the formation of the company, including those of or having reference to the preparation and execution,' of the deed, I think it was wrong not to allow this bill as a debt. . . . Subject to that (the agreement to tax costs) I think this is admissible, upon the strictest principle, as a debt under the Winding-up Act, and I come to that conclusion for this reason: quite independently of the Winding-up Acts, it has been long ago established . . . that these companies cannot take the benefit of what has been done by those who have formed them without thereby incurring responsibilities to those persons. Now, that observation, which has been extended to a very great class of cases under the Winding-up Acts, applies, in my mind pre-eminently to a solicitor who is doing that without which the company never could have existed. It is an old and well known principle in the law that when one

* *Terrell* v. *Hutton*, 4 H. L. C. 1091.

person does an act as agent for some other person, though then quite unknown to that other, if afterwards the latter *adopts* the act, it is just the same as if he had authorized it from the beginning. I think that principle will, with the help of the 44th article, enable your lordships safely and distinctly to come to a conclusion here. I am not certain that it would not have been sufficient without that article. That which was done for the necessary purpose of forming the company, or in the prosecution of the necessary business of the company after it was formed, is to be treated as a debt of the company, *ab initio*. If that is so, then the only question is as to the amount which is due, because that the appellant did purport to act (whether with or without authority) as the solicitor of some embryo company cannot be disputed. The suggestion must go beyond taxation, because the appellant must establish ultra taxation, that there are items properly coming within the description of the 44th article."

Per Lord St. Leonards: "Then we come to the Winding-up Act. I cannot feel that there is the slightest doubt in the description of a creditor there. 'The word "creditor" shall include every person having any debt or demand enforceable against any company in any court of law or equity, or for non-payment, or non-satisfaction of which damages could be recovered.' So that the Winding-up Act does most expressly provide for what may be called equitable debts as well as legal debts. Any argument, therefore, to show that there would be a difficulty, if not an obstacle, in the way of recovering at law this particular

demand, is of itself a sufficient reason for giving to the party relief in equity if the demand constitutes an equitable debt. The moment you say you cannot recover a debt at law, assuming it to be a just debt which ought to be paid out of the assets of the company, it must properly be recoverable in equity. The intention was to provide for debts recoverable only in equity, as well as for debts recoverable at law."

In *Re Tilleard* * the special Act of a railway company enacted that the expenses, costs and charges of obtaining and passing the Act and preparatory thereto should be paid by the company, the company was held bound to pay the costs of the company's solicitors incurred in relation to certain projected lines of railway originally intended to have formed part of the company's undertaking, but abandoned in Parliament by the promoters and not actually sanctioned by the company's Act.

Although it was at one time questioned how far, in strictness, the demand of a solicitor could be made directly against a company or body not in existence at the time when the bill of costs was incurred, it is now the habit to consider this class of demands in the light of continuing demands for preliminary or preparatory costs; and as soon as the company's Act passed a liability from the company to the solicitors was constituted.†

In any question as to whether costs are payable by a

* 3 De Gex, J. & S., p. 519.

† See judgment of Lord Justice Knight-Bruce in *Re Tilleard*, 3 De Gex, J. & S., p. 527.

company, in respect of professional services rendered prior to its incorporation, it is a material circumstance that the promoters of the original scheme are themselves amongst the directors of the company.*

A solicitor who was promoting a railway company induced various persons to sign the subscription contract, by an assurance that they should incur no liability if the line was not made. Some of these persons were provisional directors. The Act was obtained, and contained the usual clause that the preliminary expenses should be paid by the company. The line was not made, the undertaking was abandoned and the company ordered to be wound up. The solicitor carried in a claim as creditor for professional services in obtaining the passing of the Act. This claim was opposed by some of the contributories, on the ground of the before-mentioned assurances: Held, that the solicitor was entitled to prove, for that the assurances made by him could only operate as a contract to indemnify the individuals to whom they were made, and did not exonerate the company in its corporate capacity.†

But if it is once established that a solicitor who has rendered professional services to a company has, notwithstanding, contracted to hold that company harmless against all claims whatsoever, including his own, such a

* See judgment of Lord Justice Turner in *Re Tilleard*, 3 De Gex, J. & S., pp. 527-8.

† *In re Brampton and Longtown Railway Company, Shaw's Claim*, L. R. 10 Ch. Ap. 177.

contract, whether made with the company directly or made with persons representing the company, for the purpose of its enuring to the benefit of the company, is a sufficient answer to an after-made claim for his services by a solicitor. However, for a contract of this kind to be a defence to such a claim by such solicitor, it is essential that it should be a contract made expressly with the company; because, if allowed as a defence at all, it must be upon the principle, either that the solicitor has undertaken in a given event not to charge for his work or labour at all, or that in the same event he has undertaken to indemnify the company against all claims, in which latter case a Court of Equity, to avoid circuity of action, will give effect to the contract of indemnity in the winding-up without putting the parties to an action of indemnity which would in the end result in giving back to the company everything which the company had paid.*

But in another case where a plaintiff had agreed with the promoters of a railway bill to bear the costs of obtaining and passing it, and the bill was passed and contained the usual clause, directing payment by the company of the costs of so obtaining and passing it; to an action for his costs by the plaintiff, the company pleaded, equitably, the previous agreement, and the plea was held to be a good one.† But although an agreement such as in the case last cited may be proved, namely, that a person has

* See judgment of Cairns, L.C., in *Re Brampton and Longtown Railway Company, Shaw's Claim*, L. R. 10 Ch. Ap. at pp. 180-1.

† *Savin* v. *Hoylake Railway Company*, 1 Exch. 9.

agreed to give services in obtaining an Act of Parliament for nothing, yet unquestionably there ought to be very clear evidence to prove that such a contract was made.*

Where the solicitor's name is actually mentioned in the prospectus issued by promoters, the question for a jury will be whether it meant that he was to be employed by those of the committee who acted, or that he was already appointed by all whose names were mentioned as their solicitor, to do all solicitor's work on their behalf; and further, what was the business usually transacted by solicitors in such undertakings on behalf of the company.†

* *Per* Mellish, L.J., in *Re Brampton and Longtown Railway Company*, L. R. 10 Ch. Ap. p. 183.

† See *Reynell* v. *Lewis*, 15 M. & W. 517, *et seq.*; *Wyld* v. *Hopkins*, *ibid.*

CHAPTER V.

DIRECTORS' QUALIFICATIONS FOUND BY PROMOTERS.

In *Hay's Case*,* before the formation of a company for the purchase of certain property, the vendors agreed with Mr. Hay that he should become a director, they providing him with the forty shares necessary to qualify him. He thereupon signed the memorandum of association in respect of forty shares, and became a director. At a meeting of directors, cheques were drawn on the bankers of the company and given to the vendors in payment of part of the purchase-money. One of these cheques being for the same amount as that due on Hay's shares, was given by the vendors to Hay, and was by him paid into his own bankers. He then drew a cheque on his own bankers, and gave the cheque to the company in payment of the sum due on his shares. The company was afterwards ordered to be wound up. It was held that Hay, being a director of the company, could not retain money so paid him by the vendors; that the money had never ceased to be the money of the company; that there had, in fact, been no payment by Hay of the money due in respect of the shares; and that he was liable as a contributory in

* *In re Canadian Oil Works Corporation, Hay's Case*, L. R. 10 Ch. Ap. 593.

respect of these shares. But where the holding of a certain number of shares is a necessary qualification for a director, merely acting as a director does not amount to a contract by the person so acting to take that number of unpaid shares directly from the company. Accordingly, in a case where each of the directors of a company was obliged to hold fifty shares, one Brown, at the request of the promoter of the company, assented to becoming a director and attended a meeting; by the direction of the promoter, who was entitled to a large number of paid-up shares in the company, paid-up shares sufficient for the qualification of a director were registered in Brown's name; it was here held that any implied contract by Brown to take shares was fulfilled by his acquiring shares in that manner, and that, under the circumstances, the shares registered in his name must be taken to have been so registered in order to qualify him as a director, or else that the agreement under which he became a director was not complied with, and he was not a shareholder.*

In re Disderi & Co.† was a case where, by a private agreement with a promoter, a director sought to evade liability, for payment of the shares necessary to qualify him. In this instance the qualification was fixed at twenty-five shares, and the directors were empowered to purchase the business for £170,000 in shares. At Disderi's request eight persons agreed to become directors on having their

* *In re Metropolitan Public Carriage and Repository Company, Brown's Case*, L. R. 9 Ch. Ap. 102.

† L. R. 11 Eq. 242.

qualifications found. They were appointed directors, and their names were entered on the register for twenty-five shares each. They then passed a resolution to buy the business for £168,000 in shares, and £2,000 in cash, and eight cheques were drawn on behalf of Disderi for £250 each, and one of them handed to each of the directors, who endorsed them, and handed them to the secretary, by whom they were passed on to Disderi. . The shares were then entered as fully paid-up, and a receipt for £2,000 was given by Disderi, and entered on the books of the company.—Held, that it was necessary to the validity of the contract to purchase the business that the directors should be previously qualified; that what had occurred subsequently did not amount to payment; and that, consequently, the directors were properly on the list of contributories for unpaid shares. Malins, V.C., in his judgment on this case said: "Eventually M. Disderi found five gentlemen ready to hold themselves out to the public as directors. They were all men in a respectable way of life, but they all declined to incur any risk whatever. They were willing to receive fees and dividends, but under no circumstances were they to embark any capital in the company, or to incur any liability. . . . I think that when persons hold themselves out as directors of a company, the public have a right to infer that they have embarked their money in the concern. . . . . They say that these shares were part of those contracted to be given to M. Disderi as the consideration for the purchase of his business; but that could not be, for there

was no contract to give him anything till they had taken their shares. Then these gentlemen, who were the mere creatures, dummies, and nominees of M. Disderi, say that at a certain meeting they proceeded to consider the contract for the purchase of M. Disderi's business. Is it becoming or decent that these gentlemen should say they have paid up their shares in full, and are therefore entitled to elect to be taken off the list of contributories? Then the question arises whether there has been any payment upon their shares. For this another business transaction is brought forward, which, I do not hesitate to say, is unworthy of a schoolboy. The transfer of cheques, by which it was carried out, I can call nothing but a ridiculous farce." *

In another case,† a director of an old company, agreed to be sold to a promoter on behalf of a new company, was named in the articles of the new company as director, and though he never applied for shares, fifty, the qualification of a director, were allotted to him, and registered in his name as paid-up shares. The nominal value of the shares was paid by the promoter, out of cheques given him on account of his promotion-money, stipulated by the articles to be paid to him under a false name. The director never received the certificates or attended board meetings, or was aware that shares had been allotted to

* See judgment of Malins, V.C., in *In re Disderi & Co.*, L. R. 11 Eq. at pp. 246-8.

† *In re Empire Assurance Corporation, Leeke's Case*, L. R. 11 Eq. 100; L. R. 6 Ch. Ap. 469.

him, but he attended an extraordinary board meeting, at which he described himself as nominal chairman, and excused himself on the ground of ill-health from taking part in the affairs of the company. A proxy was used on his behalf, which he denied having given. Under these circumstances it was held he was a shareholder for fifty unpaid shares.

In refusing the application for the removal of Admiral Leeke's name from the list of contributories, Sir John Stewart, V.C., in his judgment in the last cited case, said,* "The application was supported on two grounds. First, that he never in fact was a shareholder. Secondly, that if he ever was a shareholder at all, his shares were fully paid. As to the first ground, I think it wholly untenable. . . . In support of the second ground reliance was placed on his having consented to take shares only on the terms of being fully indemnified, and that the shares which he took were taken on the footing of their being fully paid up, and so entered on the register. As usual in cases where the shares sought to be treated as fully paid, the case is rested on an agreement to have them so treated. It is not easy to see what the value in any case can be of an agreement which is supported by a false entry in the register, and which in effect defeats the right of the creditors against the shareholders, even to the limited extent of liability which the statute prescribes. But in this case it is said that the shares were paid up, not by Admiral Leeke, but by moneys supplied for the purpose

* See L. R. 11 Eq. at pp. 105-8.

by Mr. W. G. Lake, the great actor and promoter in the affairs of these companies. It is said that for his services in the affairs of these companies it was agreed that a sum of £10,000 should be paid to Mr. Lake, and that out of this sum the amount of calls should be paid in respect of the fifty shares in the Empire Corporation allotted to Admiral Leeke. Accordingly, without any payment whatever having been made, the fifty shares of Admiral Leeke were entered on the register as fully paid-up. The affidavit of Mr. Lake fully and clearly states how what he calls the formal payments were made as to these and other shares. 'The cheques were in different sums, and bore different dates, and were given upon the distinct understanding that the proceeds of each cheque should be again paid into the company's bankers prior to another cheque being cashed, so as formally to make up the payments on the directors' shares.' It is by this juggle that Admiral Leeke's shares are asked to be treated as fully paid up. That there might be no ingredient wanting to complete the fictitious nature of the transaction, it was part of the agreement that Mr. Lake should assume the name of George Bailey, which was used on these cheques, and they were endorsed by him in that name. It is impossible to treat these shares as having been paid up on such an arrangement as this . . . An agreement among the shareholders to contribute their capital not in money but in any commodity, with no criterion of value but the agreement of the shareholders would make the subscribed capital a mere delusion. . . . Although decisions have been cited

to me which seem to warrant a conclusion as to the validity of such agreements, I do not think they bind me to consider that the shares of Admiral Leeke can be considered as paid by such a juggle as was here practised. Therefore the motion must be dismissed with costs." *

In *Carling's Case*,† one Walker entered into an agreement with a person as trustee of an intended company for the sale to the company of a property for a certain sum in cash, and a certain number of fully paid-up shares. The agreement was not to be binding unless adopted by the company when formed. The company was formed, and the agreement was set out in the articles. Walker applied to the appellants to become directors, which they agreed to do upon his promising to transfer to them fully paid-up shares to qualify them. They acted as directors, and adopted the agreement for sale. The number of shares requisite for the qualification of a director was five, but after the completion of the purchase thirty paid-up shares were, by direction of Walker, allotted to each of the appellants, and they were entered on the register as holders each of thirty fully paid-up shares, and received certificates to that effect. An order was afterwards made for winding-up the company, and Jessel, M.R., settled them on the list of contributories for thirty unpaid shares each. On appeal from this decision, it was held that the appellants, as to the shares allotted to them, stood in the

* Compare herewith *Brown's Case*, L. R. 9 Ch. Ap. 102.

† *In re Western of Canada Oil, Lands, and Works Company, Carling, Hespeler, and Walsh's Cases*, 1 Ch. Div. 115.

same position as if those shares had been allotted to Walker, and transferred to them by him; and that, as there was no contract between them and the company that they would take shares independently of their accepting certificates stating them to be holders of these fully paid-up shares, they could not be placed on the list of contributories as holders of unpaid shares; and the order of the Master of the Rolls was discharged without prejudice to any application that might be made against them under the Companies Act, 1862, section 165, or otherwise, on the ground that they had entered into a corrupt bargain with Walker. Although directors commit a very grave and very reprehensible breach of trust in accepting a qualification from a person who was a vendor to the company, and with whom it would be their duty to deal as trustees for the company, yet in each case the facts must be looked at to ascertain whether or not a binding and direct contract with the company was entered into to take shares, or whether the only contract between the shareholder and the company was that which arises from the fact that certificates of the shares as paid-up were sent to him, and accepted by him.

Where the case depends upon the existence of a direct contract between shareholders and the company, the contract must either be approbated or reprobated; but if the contract was a contract that they would take paid-up shares, it cannot be converted into a contract to take unpaid shares.

Where the transfer of shares to directors is made

under circumstances which clearly amount to a bribe or present to them, a breach of trust is constituted, and a misfeasance in respect of which they would have to account in exactly the same way, and upon the same principle, as if they had received a piece of property, or a diamond, or a sum of cash; that is to say, the company would be entitled to get back from their unfaithful trustees what they had acquired by reason of their breach of trust and misfeasance. Under the above circumstances, the directors would be liable to be called upon under the 165th section of the Companies Act, 1862, at the suit of the company, or at the suit of any creditor of the company, to make compensation as the Court should think ought to be made under the circumstances with respect to the misfeasance.*

Pearson's Case† was another instance of an application to make a director liable for misfeasance under the 165th section of the Companies Act, 1862. Sir Edwin Pearson, a director of the Caerphilly Company, received from one of the promoters a number of paid-up shares sufficient to qualify him, and then took an active part in carrying out a conditional contract for the purchase by the company of a colliery belonging to the promoters, and for purchasing and working which the company was formed. It appears that this Caerphilly Colliery Company was got up or promoted by certain individuals, of whom a Mr.

* See judgment of James, L.J., in *Carling's Case*, 1 Ch. Div. 115.

† *In re Caerphilly Colliery Company, Pearson's Case*, 4 Ch. Div. 222; 5 Ch. Div. 336.

William Hannam was one, Messrs. Moore and Delatorre apparently being the others, and a Mr. Bridell, a person whose name was made use of, as an agent or trustee for them. These three promoters were actual vendors to the company of the colliery, for working which the company was formed. By a contract dated the 3rd April, 1869, which was in substance contemporaneous with the Memorandum and Articles of Association dated the 6th of April of the same year, the colliery was to be sold to the company partly for cash and partly for a certain number of paid-up shares; and it further appears by the Articles of Association of the company that, as regards paid-up shares, share warrants were to be issued in accordance with the terms of the Companies Act, 1867. It further appears that Mr. William Hannam endeavoured to obtain directors to carry out this arrangement, which no doubt was a highly beneficial one for him; and among other persons he applied to Sir Edwin Pearson, who consented to become a director of the company. Sir E. Pearson admitted that he assisted Mr. Hannam very much in getting up the company, and that he expected to be paid for his services. So that the arrangement between Sir Edwin Pearson and the person whom he knew (as proved in evidence) to be a promoter of the company, and into whose actual position he did not inquire, but who really was one of the principal vendors to the company, was that this person gave Sir E. Pearson twenty-five share warrants, part of the purchase-money for the property, to enable him to act as a director at the board to carry out this very contract for the sale to the company

at a very large profit. Vice-Chancellor Bacon having ordered Sir E. Pearson to pay to the official liquidator the sum of £125 in respect of these shares, Sir E. Pearson appealed; the Court of Appeal, however, affirmed the judgment of Vice-Chancellor Bacon.

Jessel, M.R., in his judgment on this case said: "Can Sir Edwin Pearson be allowed to say in a Court of Equity that he, having received a present of part of the purchase-money, and being knowingly in the position of agent and trustee for the purchasers, can retain that present as against the actual purchasers? It appears to me that, upon the plainest principles of equity and good conscience he cannot. Whether the purchase was or was not an advantageous one for the company,—whether the property which they purchased at this large profit was or was not worth the increased price they paid for it, is a question wholly immaterial for us to consider; he cannot, in the fiduciary position he occupied, retain for himself any benefit or advantage that he obtained under such circumstances. He must be deemed to have obtained it under circumstances which made him liable, at the option of the *cestuis que trust*, to account either for the value at the time of the present he was receiving, or to account for the thing itself and its proceeds if it had increased in value. The company elect, on the present occasion, to ask to charge him with the value of the twenty-five share warrants at the time of their delivery." *

* See judgment of Jessel, M.R., in *Pearson's Case*, 5 Ch. Div. at pp. 340-1.

Where, as in the case just cited, by the contract of purchase, half or a large proportion of the purchase-money is to be taken in fully paid-up shares, it is an *element* in the consideration of the value of the shares to be charged to the director accepting the same, but not *conclusive* evidence that such shares are worth their full nominal value.*

* See judgment of Jessel, M.R., in *Pearson's Case*, 5 Ch. Div. 341.

CHAPTER VI.

CONTRACTS AND LIABILITIES OF PROMOTERS.

In the case of *Riley* v. *Packington* * the defendant was associated with one Whitehead and others in the formation of a public company. At a meeting of the projectors, of which the defendant was chairman, a resolution was passed that the prospectus then read, and marked with the initials of the defendant, be approved and printed for private circulation; and at a subsequent meeting, of which also the defendant was chairman, a further resolution was passed, "that the prospectus as altered and marked with the chairman's initials, be approved as the prospectus of the company, and that the same be printed for circulation and advertised at the discretion of Whitehead as early as possible." Whitehead employed the plaintiffs to print the prospectus, showing them the initiated copy, and telling them that he was authorized by the defendant to get it printed. The prospectus when printed was delivered at the office of the company, and was adopted and circulated by the defendant. There was an arrangement, not communicated to the plaintiffs, between the defendant and Whitehead that all expenses of

* L. R. 2 C. P. 536.

forming the company, down to the allotment of shares, were to be borne by Whitehead. Under these circumstances it was held, that there was evidence from which the jury might infer that Whitehead had authority to pledge the defendant's credit for the printing.

In *Maddick* v. *Marshall*,* as in the case just cited, there was a private arrangement as to the payment of the preliminary expenses; but the argument founded upon that fact was not allowed to prevail; and if the resolution itself had been shown to the plaintiffs at the same time as the representation of authority was made, the present case would not be distinguishable from *Maddick* v. *Marshall*.

If one man, by his conduct, has clothed another with apparent authority to contract, he is bound.†

In *Scott* v. *Lord Ebury* ‡ the solicitor and secretary of a projected railway company, by authority of the promoters, and by means of a cheque signed by two of them, obtained from the plaintiff an advance of £500, to be applied in payment of parliamentary fees, upon an agreement expressing that it was "to be repaid out of the calls on shares." An Act authorizing the construction of the railway passed, the promoters being named therein as the first directors; and at a meeting subsequently held the directors passed a resolution that the acts of their solicitor and secretary should be adopted and confirmed. No

* 16 C. B. (N. S.) 387.

† *Per* Montague Smith, J., in *Riley* v. *Packington*, L. R. 2 C. P. at 543.

‡ L. R. 2 C. P. 255.

shares were allotted or calls made, and the undertaking was not proceeded with. It was held that the advance was made upon the personal responsibility of those who signed the cheque, and that the subsequent adoption of their acts by the directors did not alter their position. The foregoing case, however, was decided at Common Law, and in the face of a recent decision would now probably be otherwise decided in equity.*

In *Earl of Shrewsbury* v. *North Staffordshire Railway Company* † the promoters of a railway company contracted with a landowner, being a peer of Parliament, to pay him £20,000 personally for his countenance and support in obtaining their Act, such sum to be independent of the ordinary payment for land, severance, and other usual compensation. After the passing of the Act the directors of the company, when formed, ratified the contract, but having doubts whether, under the Lands Clauses Act, the landowner was entitled to the money personally, they covenanted by deed to pay interest upon the amount, which was to be retained by the company or paid into Court. A separate agreement stipulated for the quantity of land to be taken for the railway, and the amount to be paid by the company. It was held that the original contract and the contract by the directors after the formation of the company to pay a sum of money for countenance and support previously given in procuring the Act, were ultrà vires of the company, and could not

* See *Spiller* v. *Paris Skating Rink Company*, 7 Ch. Div., 368.

† L. R. 1 Eq. 593.

be enforced against the company as payment of expenses of obtaining the Act, under the 65th section of the Companies Clauses Act or otherwise. The doctrine laid down by Lord Cottenham, that a company after formation is bound by the contracts of its promoters, was, in this case, disapproved of; and, so far as it applies to anything to be done which is ultrà vires of the company must be considered as overruled. Doubtless Lord Cottenham carried the doctrine in question beyond its legitimate limit; but the modern doctrine is that after formation a company may either adopt or ignore the acts or contracts of its promoters; but, if it elects to adopt them, the company will be prevented in equity from adopting the beneficial part of the contract and rejecting the burden. The Metropolitan Board of Works are "promoters" within section 133 of the Lands Clauses Act, 1845, and may be liable to an action in respect of any deficiency in the poor rate caused during the construction of their works by their acquisition of rateable land in a parish. It would seem that persons intrusted with the construction of public works under Acts which incorporate the Lands Clauses Act, 1845, are, in the absence of special circumstances, "promoters" within section 133 of that Act. Section 133 applies if it appears that the works when constructed may, in part or in whole, be the subject of beneficial occupation.* Further, section 133 of the Lands Clauses Consolidation Act, 1845, provides that "if the promoters of the undertaking become possessed by virtue of this or

* *Wheeler* v. *Metropolitan Board of Works*, L. R. 4 Ex. 303.

the special Act, or any Act incorporated therewith, of any lands liable to be assessed to the poor's-rate, they shall, until the works shall be completed, be liable to make good the deficiency in the assessments for poor's-rate by reason of such land having been taken or used for the purposes of the works." But it has been held that the promoters are not liable under this section to be rated to the relief of the poor in respect of such lands.*

* *Corporation of London* v. *Churchwardens and Overseers of St. Andrew, Holborn*, L. R. 2 C. P. 574.

CHAPTER VII.

RECOVERY OF DEPOSIT ON SHARES FROM PROMOTERS.

In a case where the promoters of a company issued a prospectus stating that deposits would be returned if no allotment of shares was made, but no allotment ever took place, it was held that this statement did not bind monies consisting mainly of these deposits, standing in a bank to the credit of the company, with a trust or lien in favour of the depositors, as against creditors of the company; and a demurrer was allowed to a bill by depositors seeking to restrain creditors from attaching the monies under a garnishee order. But an action may be brought by depositors upon applications for shares in an abortive company, in which no allotment of shares has been made on behalf of themselves and all other depositors.*

Vice-Chancellor Wood, in his judgment in the case just cited, said:—"The plaintiffs say, not only that these promoters are liable as for money had and received, but that they have no authority to deal with it otherwise than upon the trust by which it was to be returned to the depositors. But if the object had been to create a lien of this kind, the obvious way of doing so would have been

* *Moseley* v. *Cressey's Company*, L. R. 1 Eq. 405.

to have said in the prospectus that there would be a lien on the deposits until the company was established, or that it was to be set apart as a trust fund in the names of the trustees, to be returned in the event of the company not being established. Nothing of this kind was done here, nor was that the contract. The contract was—'You are to pay so much per share when you apply for shares.' Payment to the company's bankers to the account of the company made the monies *ipso facto* part of the company's assets. . . . . The directors have allowed the money to be paid to the credit of the company, they being liable to an action for money had and received."

But although in this case it was held that monies lying in the bank to the credit of the company were not impressed with a trust or lien in equity in favour of the depositors, yet the case of *Walstab* v. *Spottiswoode* * shows that depositors have a *legal* remedy for the return of their deposits.

A contract to take shares in a company cannot be set aside because it was founded on a prospectus which contains exaggerated views of the advantages of the company, but does not contain any material mis-statement of fact. Where, therefore, a prospectus stated that a certain invention which it was the object of the company to work had been tested, and that according to the experiments the material could be produced at a specified cost, but that it was intended to test the invention further, and the invention turned out worthless, and it appearing that there had

* 15 M. & W. 501.

been some testing, it was held that this was not such a misrepresentation as would enable a purchaser of shares to set aside the contract.*

The reason of the foregoing decision is, "that anybody who looks at a prospectus understands that the thing is coloured, in the sense that everything is put forward in the most favourable view it can be." †

Nothing, however, will justify a statement that is totally false, and if a material statement is made which is untrue, upon the faith of which a person takes shares, he is entitled afterwards to come to the company and require those shares to be cancelled, and the payment he has made on them returned to him.

On a claim to have shares in a company returned, a plaintiff must make out a case of having been fraudulently deceived, and also of having sought redress within a reasonable time. As the shares in point of fact do not exist, all a plaintiff can require is the repayment of his deposit; for which purpose the proper mode is an action at law, which he can maintain if he has merits in the case.‡

Where a plaintiff, having been struck off the register of a company by an order of the Court, on the ground of excess in the objects of the company, as shown by the Memorandum registered after he became a member, over

* *Denton* v. *Macneil*, L. R. 2 Eq. 352.

† *Per* Turner, L.J., in *Kisch* v. *Central Railway of Venezuela*, 34 L. J. (Ch.) 545.

‡ *Per* Lord Romilly, M.R., in *Denton* v. *Macneil*, L. R. 2 Eq. at pp. 355-6.

those stated in a prospectus on the faith of which he took shares, filed a bill for the return of his deposit-money against the directors who issued the prospectus, and the company, not alleging fraudulent intention, a demurrer by the company was allowed, on the ground that the money in their hands was not impressed with a trust. A demurrer by the directors also allowed, on the ground that mere excess of authority by an agent does not constitute equitable fraud, and that any relief in such case must be at law.*

In his judgment in *Stewart* v. *Austin*, Lord Romilly, M.R., said: "I allow the demurrer of the directors, as well as of the company, on the simple ground that it is not fraud in the view of this Court where a person takes your money for a given purpose, and then, without your authority, applies it to a larger and more extensive purpose which he may think equally for your benefit, or, indeed, better for you; not attempting to apply it to his own use, but merely applying it to purposes which you have not authorized. That may be the case of an agent exceeding his authority, and being liable for breach of his duty; but it is not fraud in this Court." †

In *Henderson* v. *Lacon*‡ a prospectus was issued giving the names of seven persons of position (not the subscribers to the Memorandum), one of them of considerable local influence, as directors, and stating that "the directors and their friends have subscribed a large portion of the capital,

* *Stewart* v. *Austin*, L. R. 3 Eq. 299.

† L. R. 3 Eq. at p. 307. ‡ L. R. 5 Eq. 249.

and they now offer to the public the remaining shares. The facts were that the directors had subscribed for, nominally, only ten shares each, and actually nothing, for the shares agreed to be allotted to them were fully paid-up shares, for which they paid, and were, by a private arrangement with a promoter, afterwards repaid out of the £2500 agreed to be given to such promoter. The number of shares taken by "friends" of the directors—treating the word as persons who became subscribers through their influence—consisted only of 140, which were taken by one firm. The whole number of shares taken was 762, and agreed to be taken 430 (out of an advertised capital of £25,000 in 2500 shares). The plaintiff applied, on the faith of the above prospectus, for fifty shares, which were allotted to him, and on which he paid £25 deposit, and £75 allotment money. The directors admitted that the prospectus was issued by their authority. It was held that the statement in the prospectus was a clear misrepresentation, which overthrew the contract between the plaintiff and the company; and that, as the statement related to the directors' own acts, they must be fixed with a guilty knowledge of the misrepresentation. Between the filing of the bill and the hearing of a motion for an injunction to stay proceedings in an action upon a call, the company had been ordered to be wound up: Held, that the plaintiff was entitled to payment of his £100 (but without interest) and costs against the directors and (notwithstanding the winding up) against the company; to have his name removed from the register of shareholders; to an injunction

to restrain the company from taking further proceedings on the judgment; and from instituting any other proceedings against the plaintiff in respect of his having been a shareholder, with liberty to proceed as he might be advised in the winding-up matter in respect of the payment of his £100 and costs.

CHAPTER VIII.

MISREPRESENTATION, FRAUD, AND CONCEALMENT BY PROMOTERS IN PROSPECTUS OF COMPANY.

A CONTRACT to take shares in a company cannot be set aside because it was founded on a prospectus which contains exaggerated views of the advantages of the company, but does not contain any material misstatement of fact.* The reason for this is, that anybody who looks at a prospectus understands that it is coloured, in this sense, that everything is put forward in the most favourable view it can be.† In order to entitle a party to rescind a contract, it is sufficient to show that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But when there has been only an innocent misrepresentation, it is not ground for a rescission, unless it was such as that there is a complete difference in substance between the thing bargained for and that obtained, so as to constitute a failure of consideration.‡

* *Denton* v. *Macneil*, L. R. 2 Eq. 352.

† See observations of Turner, L.J., in *Kisch* v. *The Central Railway of Venezuela*, 34 L. J. (Ch.) 545.

‡ *Kennedy* v. *Panama, &c., Royal Mail Company, Same* v. *Kennedy*, L. R. 2 Q. B. 580.

Heymann v. *European Central Railway Company* * was a case where, though certain transactions between the "concessionaire" of the railway and some of the directors were omitted from the prospectus, yet the same contained no misrepresentations. Under the particular circumstances of the case it was held that there was no such suppression of *material* facts in the prospectus as to entitle a person who had been induced by it to take shares in the company to be relieved from them. It would seem from this case, that a shareholder who institutes a suit to be relieved of his shares on the ground of misrepresentation more than three months after he has discovered the misrepresentation, loses his right to relief by his delay. A contract induced by fraudulent concealment and misrepresentation of important facts by directors in their prospectus is voidable, not void.†

Moreover a plaintiff cannot be relieved on the ground of misrepresentation in the prospectus on a bill filed after the commencement of a winding-up.‡ The width of the language of the 38th section of the Companies Act, 1867, is calculated to alarm those concerned in the formation and promotion of companies, but the Courts have decided that the said section is applicable only for the protection of shareholders in the company, and creates no

* L. R. 7 Eq. 154.

† *In re Overend, Gurney & Co., Ex parte Oakes & Peek, Oakes v. Turquand*, L. R. 3 Eq. 576; L. R. 2 H. L. 325.

‡ *Kent* v. *Freehold Land and Brickmaking Company*, L. R. 4 Eq. 588; L. R. 3 Ch. Ap. 493.

statutory duty towards bondholders of the company or others for breach of which an action on the statute will lie. The section creates no statutory cause of action, but merely amounts to a declaration that, as between shareholders and those issuing the prospectus, the latter shall be deemed to have acted fraudulently.*

In *Gover's Case* † a person named Mappin agreed with the owner of a patent to purchase the patent for £65,000, to be paid partly in cash and partly in the shares of a company to be formed by Mappin. Three months afterwards Mappin made an agreement with a trustee for an intended company to sell the patent to the trustee for £125,000, payable partly in cash and partly in shares in the company. Shortly afterwards the company was formed, Mappin being a director. A prospectus was issued which did not mention the first agreement for purchase. Miss Gover applied to have her name removed from the list of shareholders of the company, on the ground that the prospectus did not contain the date of, and the parties to, the said contract between Mappin and the owner of the patent. Vice-Chancellor Bacon decided that, as Mappin had not been shown at the date of his contract with the owner of the patent to have been a promoter of, or in a fiduciary position towards, the company afterwards formed, the omission from the prospectus of all notice of that contract was not fraudulent within the meaning of the 38th section of the Companies Act, 1867;

* *Cornell* v. *Hay*, *Same* v. *Massey*, *Same* v. *Torrens*, L. R. 8 C. P. 328.
† 1 Ch. Div. 182.

and also that, independently of the said Act of 1867, neither the omission from the prospectus of the agreement with the owner of the patent nor the increased price charged by Mappin on his sale to the company of the patent, afforded any ground, under the Companies Act, 1862, section 35, for releasing shareholders who took their shares in ignorance of these circumstances. It would seem, that if Mappin had been an actual promoter of the company at the time of the contract, so as to bring the case within section 38, the remedy given by that section for fraudulent omission was against the delinquent promoter, personally, and not against the company, by removing the name of the shareholder, who had taken his shares on the faith of the prospectus, from the register.*

In re Royal Victoria Palace Syndicate, Moore & De La Torre's Case,† was an instance of promoters being held contributories to the extent of their misrepresentation. Here, an undertaking having been set on foot for the purchase and alteration of a theatre, a partnership consisting of more than seven members was formed for the purpose. Two of the promoters being members, issued a circular, in which was contained the following statement:—"The entire remodelling, redecorating, and refurnishing will cost £12,000, and of this sum £5000 only remains for subscription." The partnership having been ordered to be wound up, as an unregistered com-

* See *In re Coal Economising Gas Company, Gover's Case,* L. R. 20 Eq. 114; 1 Ch. Div. 182.

† L. R. 18 Eq. 661.

pany, under the 200th section of the Companies Act, 1862, the two promoters were settled on the list of contributories for all the balance of the unsubscribed-for capital up to £12,000.

Craig v. *Phillips* * was another case under the Companies Act, 1867, section 38. The plaintiff and defendant, being both interested with others, in mines which required the use of coal, defendant, on the 26th March, 1873, wrote to the plaintiff amongst others, a letter, mentioning a property consisting partly of smelting works and partly of a colliery then for sale, recommending it as a first-class investment, and offering it to the plaintiff and others in the terms of a prospectus about to be issued. The latter mentioned the capital of, and number of shares in, a company proposed to be formed for working the businesses. On the 10th May, 1873, defendant contracted to purchase the property for £16,000, in cash, to be paid by instalments. By another agreement, dated the 29th May, 1873, defendant agreed to sell the property to two persons, expressly as trustees for the intended company for £23,000 in cash, also to be paid by instalments. On the 2nd June, 1873, a prospectus was issued in which the name of the defendant appeared as managing director and in which the contract of the 29th May of the same year was the only one referred to; and on the 9th June plaintiff agreed to take 200 shares of £5 each in the company, which was duly registered in the following July. The plaintiff instituted a suit, in which he prayed for a

* 3 Ch. Div. 722.

declaration that he was induced to take the shares by the fraud and deceit of the defendant, contending that the contract of the 10th May ought to have been specified in the prospectus. However, the omission in the prospectus of mention of the said contract of the 10th May was held not fraudulent within the meaning of the 38th section of the Companies Act, 1867; and inasmuch as upon the evidence the statements in the letter and prospectus did not amount to misrepresentation, either within the knowledge of the defendant, or in fact, the bill was dismissed.

Twycross v. *Grant* * was also an action brought by the plaintiff under section 38 of the Companies Act, 1867, to recover the amount paid by him on certain shares taken by him in the Lisbon Steam Tramways Company, Limited, on the ground of the fraud of the defendants (who were promoters of the company), in omitting from the prospectus two contracts entered into by them as promoters —the one a contract between the defendants Clark and Punchard and the Duke de Saldanha for the purchase of concessions for tramways which the company was afterwards incorporated to make and work; the other a contract between the defendants Clark and Punchard and the defendant Grant, as to certain payments to be made by Clark and Punchard to Grant in consideration of his obtaining for them a contract from the company for the construction of the tramways, by means of which fraud the plaintiff had been induced to take the shares, which proved worthless. The jury found that these contracts

* 2 C. P. Div. 469.

were material to be made known to the intended shareholders of the company. The Common Pleas Division and the Court of Appeal held that the contracts ought to have been specified in the prospectus, and that the defendants were liable. The words "knowingly issuing" in section 38 mean intentionally issuing a prospectus without inserting the contracts which are required by that section to be specified, although they are omitted under the *bonâ fide* belief that it is unnecessary to specify them.*

Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it. And when promoters clearly stand in a fiduciary position to a company, and not only avoid making a complete disclosure, not only conceal material facts, but also misrepresent material facts, there can be no binding coutract on the company.†

In *Phosphate Sewage Company* v. *Hartmont*,‡ certain persons who were owners of a concession from a foreign government combined together to form a company to

* *Per* Cockburn, C.J., Bramwell and Brett, L.JJ., in *Twycross* v. *Grant*, 2 C. P. Div. at pp. 491—546.

† *New Sombrero Phosphate Company* v. *Erlanger*, 5 Ch. Div. 73 ; 3 App. Cases, 1218.

‡ 5 Ch. Div. 394.

purchase the concession, knowing at the time that through their default it was voidable and liable to forfeiture. The owners and others who were promoters of the company fraudulently sold the concession, being aware of the infirmity of the title, to trustees for the intended company, and it was transferred to the company by the trustees, who were to be paid a portion of the purchase-money for their share in the transaction. The solicitors for the vendors, who were also solicitors for the company, concealed the invalidity of the title, and the trustees neglected to require evidence to establish the title. Upon a bill filed by the company against the vendors of the concession, the promoters, the trustees, the directors, and the solicitors, it was held that the owners and promoters must repay the whole purchase-money; that the trustees who received money in the nature of a bribe for neglecting their duty must repay what they had so received; and that all the defendants, including the solicitors, must pay the costs of the suit. In every case where a prospectus is issued to invite persons to become shareholders in a projected company, the public are entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess.*

When the allotment of shares is completed, the office of the prospectus is exhausted, and a person who has not become an allottee, but is only a subsequent purchaser

* *Venezuela Railway Company* v. *Kisch*, L. R. 2 H. L. 99.

of shares in the market, is not so connected with the prospectus as to render those who issued it liable to indemnify him against the losses which he had suffered in consequence of his purchase.*

* *Peek* v. *Gurney*, L. R. 13 Eq. 79 ; L. R. 6 H. L. 377.

CHAPTER IX.

PROMOTION MONEY.

PROMOTERS will be allowed any moneys to which they may fairly be entitled; but a secret agreement between them and vendors of property to the company will invalidate their claim. The Articles of Association of a banking company with a nominal capital of £1,200,000 in 60,000 shares, of which the prospectus stated that the first issue would be 30,000, empowered the directors to commence business as soon as they thought fit, notwithstanding the whole capital might not have been subscribed for; and provided that upon the first allotment of shares £10,000 should be paid to the promoters. Six weeks after the formation of the company, 5319 shares only having been subscribed for, of which 800 were subscribed for by four directors, the directors allotted the shares, and paid £5000 to the promoters, of which £2000 was, in pursuance of an agreement made before the formation of the company, but not noticed in the Articles of Association, applied in paying the deposits on the 800 shares of the four directors. The concealment of the agreement between the promoters and the four directors was held to release the shareholders from their contract with the promoters contained in the

articles, and also that in making the allotment of shares the directors could not, under the circumstances, be considered to have exercised their discretion *bonâ fide;* and on these grounds a claim by the promoters in the winding-up of the company for the balance of the £10,000 was disallowed.*

All persons who enter into a company must be taken to know the contents of the Articles of Association, and are bound by a contract contained in those Articles; but when an agreement is stated in the Articles of Association, *the whole* of that agreement should be stated; there ought not to be a sub-agreement, of which the public know nothing, and of which no inkling can be obtained until a later period.†

Promoters cannot insist upon the performance of a contract respecting which they have not divulged the whole truth to the world, and of which they have pressed the completion and accomplishment for their own personal benefit.‡

In *Madrid Bank* v. *Pelly*,§ before the company was in a situation to commence business, the directors allotted the shares and paid £5000 to the promoters, who immediately paid to four of the directors £500 apiece. The company having been ordered to be wound up, in a suit by the official liquidator, in the name of the company

* *In re Madrid Bank, Ex parte Williams*, L. R. 2 Eq. 216.

† *Per* Lord Romilly, M.R., in *Ex parte Williams*, L. R. 2 Eq. at p. 218.

‡ *Ibid.*

§ L. R. 7 Eq. 442.

against the directors, to which the promoters were not parties, it was held that the directors could not be charged with the money paid to the promoters, but that each of the four directors must repay to the company the £500 received by him from the promoters.

Where a company in course of liquidation is ordered to pay costs, such costs are not to be proved as a debt in the winding-up, but are payable in full out of the assets of the company.*

In *Bank of Turkey* v. *Ottoman Company*† a suit was instituted on behalf of the Bank of Turkey, praying relief on the footing that a payment for promotion money made by their directors to the Ottoman Company was a breach of trust; the Court refused to restrain the Ottoman Company (which was a limited company being voluntarily wound up) by interlocutory injunction from dealing with the money or dissolving the company: the right to such money being the question to be decided at the hearing, and there being no admission of a trust so as to entitle the plaintiff company to an order for payment of the money into Court. According to the statement of the bill the Bank of Turkey, Limited, was formed in October, 1865, having been projected by certain of the directors of the Ottoman Company, Limited, formed in 1862; the prospectus of the Bank of Turkey being thus headed:—"The Ottoman Company, Limited, invite applications for the capital of the Bank of Turkey, Limited." The Articles of Association of the Bank of Turkey contained the follow-

* *Madrid Bank* v. *Pelly*, L. R. 7 Eq. 442. † L. R. 2 Eq. 366.

ing clause :—"In their management of the business of the company the directors without any further power or authority from the shareholders, may do the following things, viz., they may and shall pay out of the funds of the company such sums as they shall think proper to be paid in satisfaction of all costs, charges, and expenses not hereinbefore provided for, and which shall have been or shall be hereafter incurred or sustained in or about the formation and establishment of the company, or the obtaining the capital, or in any other matter in relation thereto; and they may appropriate and pay such reasonable amounts by way of commission, or otherwise, as they may think fit, to any person or persons in respect of any services performed, or benefits derived by or through such person or persons, in relation to the formation or bringing out of the company." According to the allegations of the bill a secret arrangement was made between the defendants, who were directors of both companies, that the Bank of Turkey should pay £5000 to the Ottoman Company as promotion money, or "in consideration of being introduced to the public." In December, 1865, pursuant to a resolution of the directors, a cheque for £5000, in consideration of services alleged to have been rendered by that company in recommending the Bank of Turkey to the public, was delivered to the Ottoman Company, and paid out of the funds of the Bank of Turkey. The bill alleged that the £5000 was paid without any consideration by the influence of Farley, Palmer, and Barnes, three of the directors, not for the purpose of *bonâ fide* promoting

the interests of the bank, but in order to benefit the Ottoman Company, and the above-named defendants personally. The defendants Farley, Palmer and Barnes, were directors of both companies, and the two companies had the same secretary. The payment of the £5000 was never communicated to the shareholders, and was not known to them until 1866, when the bank, which had never commenced business, was voluntarily wound up. The bill alleged that under the circumstances this payment was not warranted by the Articles of Association, and was a breach of trust on the part of the directors of the bank, of which the Ottoman Company had full notice. Sir W. Page-Wood, V.-C., in giving judgment, said: "I should be the last person in the world to throw out any expression which would sanction those monstrous agreements for promotion money, of which the proprietors know not a word when they subscribe their money; but here the shareholders must be taken to have known the contents of the Articles of Association, by which the directors were empowered to pay such reasonable amount by way of commission in relation to the formation of the company as they might think proper; and looking at the enormous amounts which have been paid for promotion money, this £5000 does not seem to be such a very appalling sum. Any shareholder of ordinary intelligence looking at the prospectus would form a pretty shrewd guess that the Ottoman Company were the persons through whom the bank had been formed and brought out. Apart from the merits, notice of the vote for this payment, and of the

cheque for £5000, is recorded in the books of the company." *

The promoters of a company, who were also directors, purchased land and sold it to a company at an increased price, retaining the difference for themselves. Part of the purchase-money was paid in debenture bonds. After the company had gone into liquidation, Larking, a director but not one of the promoters, purchased one hundred of the debentures at 25 per cent., for which he claimed to prove. Malins, V.-C., held that Larking, as a director, could not plead ignorance of the purchase by which the shareholders were defrauded; that, having been in the position of a trustee for the shareholders, he could not, by the purchase of debentures after the insolvency, make a profit out of a transaction which, as such trustee, he ought to have prevented, and that the claim must be disallowed. On the claim being heard by the Court of Appeal the matter was compromised on the terms of the official liquidator paying to Larking the amount which he actually paid for the debentures, with interest from the date of purchase.†

In *Bagnall* v. *Carlton* ‡ the plaintiffs were a joint stock company which was formed for the purpose of purchasing and working a colliery and ironworks formerly the property of J. Bagnall, deceased. Before the company was formed J. Bagnall's trustees entered into negotiations

* L. R 2 Eq. at pp. 369-70.

† *In re Imperial Land Company of Marseilles, Ex parte Larking*, 4 Ch. Div. 566.

‡ 6 Ch. Div. 371.

with Richardson, a financial agent, to get up a company for the purchase of the property for about £300,000. Richardson applied to Carlton, and Carlton made an arrangement with Grant upon the terms stated below. Two contemporaneous agreements were signed, by one of which the trustees agreed to sell the property to a trustee for the company for £300,000; and by the other, which was called in the pleadings the secret agreement, the trustees agreed with Carlton that he should bring out the company or forfeit £20,000; and that they should pay £85,000 for commission and risk. On the same day Carlton agreed with Grant that Grant should take the whole risk of bringing out the company, and should receive £60,000 and Carlton £25,000 of this bonus. Duignan & Co., the vendors' solicitors, were to receive £1500 from the tenant for life of the property if the purchase was completed. The company was established, the first directors being found by Richardson; and Duignan & Co. became the solicitors of the new company. The prospectus and articles referred to the agreement for the purchase of the property, but made no mention of the agreement between the vendors and Carlton, or of any of the arrangements relating to it. The purchase-money was paid to the vendors, who paid out of it £85,000 to Carlton, of which he gave £60,000 to Grant and £10,000 to Richardson. The directors were not informed by Duignan & Co., or any other person, of the agreement between the vendors and Carlton; but some time afterwards they discovered it, and thereupon called a general

meeting of the company to consider the subject. The result was that a bill was filed by the company against the vendors and against Richardson, Carlton, Grant, and Duignan & Co., praying that the purchase might be rescinded, or that the defendants might be held liable to repay all the profits which they had made by the transaction; the plaintiffs offering to allow expenses properly incurred and a fair commission. Before the cause came to a hearing the plaintiffs compromised the suit with the vendors, receiving from them £31,000 as the price of not insisting on the purchase being rescinded. The suppression in the prospectus of the agreement between the vendors and Carlton was held to be unjustifiable; and that the defendants Richardson, Carlton, and Grant were in a fiduciary relation to the intended company, and therefore could not be allowed to retain any profit which they had made without disclosing it to the company. Also that the compromise with the vendors did not affect the claim of the plaintiffs against the defendants Richardson, Carlton and Grant, and that they had no claim to any allowance in respect of the £31,000 paid by the vendors on such compromise. But the Court of Appeal varied the decision of Malins, V.C., to this extent that the defendants Richardson, Carlton and Grant were entitled to be allowed their expenses properly incurred in bringing out the company; and that although they would not have been entitled to any commission unless the plaintiffs had offered to allow it in their bill, the plaintiffs could not retract their offer, and a fair commission must be allowed. Further,

that although Duignan & Co. had acted improperly in concealing from the company the agreement between the vendors and Carlton, they ought to have been dismissed from the suit when the plaintiffs elected not to rescind the purchase; and inasmuch as Duignan & Co. had acted in the matter with no fraudulent intent, the Court dismissed the suit against them without costs up to the time of the compromise, and with costs as to all subsequent proceedings.

In re Hereford and South Wales Waggon and Engineering Company * was a case where by an agreement made between the vendor of certain ironworks and two promoters, it was agreed that if the latter succeeded within three months in getting up a company for the purchase of the ironworks at a valuation, they should, out of the purchase-money, receive £1500. By an agreement dated a few weeks later, the vendor agreed with one of the promoters, as trustee for the company, that the company should buy the ironworks at a valuation. The two promoters did not get up a company within the three months, but after some time they formed a company with seven shareholders, who were also the directors. These shareholders were not informed of the agreement to pay the two promoters the £1500. The company was registered, and by the Articles of Association the agreement for the purchase of the property at a valuation was adopted, and it was provided that the directors should pay all expenses incurred in the getting up and registering

* 2 Ch. Div. 621.

the company. However, very few other shares were applied for, none were allotted and the company was wound up. The two promoters claimed in the winding-up remuneration for their services both before and after the company was formed, and the valuer claimed his charges for valuing. It was decided that though the two promoters might not have a legal claim as to services before the formation of the company, they would have had a good equitable claim, so far as the company derived benefit from them, and would have a legal claim as to services rendered after the formation of the company, but that the concealment of the agreement as to the £1500 constituted a fraud, and that as the shareholders had been by fraud induced to join the company, and as the company had received no benefit from the services of the two promoters, they could not claim from the company remuneration for those services. The claim of the valuer was decided to be against the two promoters only.

The costs of a solicitor incurred in getting up a company, and, after its incorporation, in obtaining the subsequent Acts, are costs incurred on account of the promotion of the company within the 5th section of the Railways Abandonment Act, 1869, and as such are not payable out of the bond given for the completion of the railway.*

In *Emma Silver Mining Company* v. *Grant*,† by an agreement between the vendors of a mine and Grant, a financial agent, the vendors agreed to sell the mine to a

* *In re Barry Railway Company*, 4 Ch. Div. 315.
† 11 Ch. Div. 918.

company to be formed by Grant for its purchase at the price named, and that Grant should receive 20 per cent. of the amount of the allotted capital of the company. By a second agreement between one Park, the agent of the vendors, and Dean (a nominee of Grant), described as agent of the intended company, Park agreed to sell the mine to the company for the price mentioned in the former agreement, but no reference was made to the percentage which Grant was to receive. Shortly afterwards the company was formed; the Memorandum of Association and prospectus, which were settled by Grant, stated that its object was to carry out the second agreement and for the purchase and working of the mine, but they contained no reference to the first agreement, under which Grant received the amount therein agreed upon. Grant secured the services of the first directors, provided their qualifications, and launched the company. In an action by the company to make him liable for what he had received without the knowledge of the company, Grant was held liable for the amount of the secret profit which he had made; but, that in estimating the amount of such profit, he was entitled to be allowed all sums *bonâ fide* expended in securing the services of the directors and providing their qualification, and in payments to the brokers and officers of the company and to the public press in relation to the company.

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